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Supreme Court of the United States

OCTOBER 1951 TERM.

No. 346.

STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee,

and

INTERSTATE COMMERCE COMMISSION AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Intervenor-Defendants-Appellees.

PETITION FOR REHEARING OF ORDER GRANTING MOTION TO AFFIRM AND FOR HEARING ON THE MERITS IN REGULAR COURSE.

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PETITION FOR REHEARING OF ORDER GRANTING MOTION TO AFFIRM AND FOR HEARING ON THE MERITS IN REGULAR COURSE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners-Appellants, the State of New York and the Public Service Commission of the State of New York, pray that this Court grant rehearing and reconsideration of its order of November 26, 1951, granting the motion of

the appellees United States of America and Interstate Commerce Commission to affirm, and affirming the judgment herein, and that the Court retain the case for hearing on the merits in due course.

Reasons for Granting Rehearing and for Argument on the Merits.

1. In this case the State of New York was divested of jurisdiction in the fixing of intrastate railroad rates without ever being given a clear reason why. This was done without proof that the rates fixed by the State agency discriminated against interstate commerce, against any person or against any locality. This was done without a finding of any specification of discrimination other than a blanket finding in the terms of the statute. In spite of the lack of proper findings with respect to the facts on which its jurisdiction was based, and in spite of the dissent of one of the Commissioners who heard the case, the District Court affirmed the action of the Interstate Commerce Commission, purportedly relying on the substantial evidence rule. Upon the State's appeal to this Court as a matter of right, the appeal was disposed of without full argument and without examination of the record on a motion to affirm, which, according to the rules of this Court, is granted where "it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the case depends are so unsubstantial as not to need further argument." even on the fragmentary presentation permitted in opposition to the motion to affirm, one of the members of this Court dissented on the merits from the affirmance of the court below. A second member of this Court voted to deny the motion to affirm and to permit a full argument of the merits of the case.

2. The need for a determination of the proportionate amount of the railroad's revenue to be borne by intrastate traffic before it is possible to conclude that intrastate rates discriminate against interstate commerce, as stated in Mr. Justice Douglas' dissent, is amply sustained by decisions of this Court and prior to this proceeding was recognized consistently by the Interstate Commerce Commission itself. If all factors relating to both types of transportation are equal, probably rates should be equal, but if there are substantial differences between intrastate and interstate service and the cost of those services, it is not enough that the Interstate Commerce Commission found that the rates for intrastate service, as fixed by the State Commission, were less than the rates for interstate service.

The elementary principle that rates and fares for transportation service performed under the same circumstances and conditions should be identical was recognized by the courts long before Section 13 was enacted. For example, the Supreme Court in the *Shreveport* case upheld an order of the Interstate Commerce Commission removing an unjust discrimination created by lower intrastate rates for transportation rendered "under substantially similar conditions of traffic" (234 U. S. 342, 354).

Consequently, since the enactment of Section 13, the issue of whether interstate and intrastate transportation is performed under substantially similar circumstances and conditions has necessarily been presented and determined in all proceedings before the Interstate Commerce Commission arising under that section. It was in accordance with this principle that the New Haven alleged in paragraph VI of its petition that "the circumstances and conditions of the transportation of New York intrastate and Connecticut-New York interstate commutation passengers

are substantially similar." (Exhibit 1 attached to the petition in the District Court.)

The basis of the New Haven's petition was that the Interstate Commerce Commission had authorized an increase in its interstate commutation fares and that, since the circumstances and conditions surrounding the two classes of commuter service were allegedly substantially similar, the lower New York fares caused the two types of discrimination prohibited by Section 13. Accordingly, New Haven asked for a Section 13 order increasing the New York fares to make them uniform with the interstate fares for the same distances.

The Interstate Commerce Commission has in all Section 13 cases made a finding concerning the transportation conditions surrounding interstate and intrastate traffic as a basis for the issuance of Section 13 orders. A few of these cases are listed below.*

In most Section 13 cases the Interstate Commerce Commission has been able to find upon substantial evidence that the circumstances and conditions surrounding interstate and intrastate traffic were substantially similar. In at least two cases, however, the evidence showed that the conditions were not similar and the proof was such that the Interstate Com-

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* *Increases in Alabama Freight Rates and Charges*, 274 I. C. C. 439, 464;
Texas Intrastate Rates, 273 I. C. C. 749, 770;
Increases in Tennessee Freight Rates and Charges, 272 I. C. C. 625, 646;
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merce Commission was able to find that the circumstances and conditions surrounding intrastate traffic were *less favorable* to the carrier than those surrounding interstate traffic.

For example, in the Florida Log case, *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 189 (292 U. S. 1), the Commission stated: "We find that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida are not on the whole as favorable [to the carrier] as the circumstances and conditions surrounding the interstate movement * * * over the defendant's line." In support of that conclusion the Commission found (186 I. C. C. at p. 187) that: "The record shows * * * the much lower earnings on its Florida log traffic than on its interstate log traffic * * * These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer scale [the intrastate rates] does not pay its 'fair proportionate share' of operation and maintenance alone."

Substantially the same finding was made in *Increases in Tennessee Freight Rates and Charges*, 272 I. C. C. 625, 646.

In this case the uncontroverted evidence shows the contrary. Here, the circumstances and conditions surrounding New York commutation traffic are *more favorable to the New Haven since the interstate commuters are provided with superior and more costly service.*

The Interstate Commerce Commission, in briefs submitted to this Court in Section 13 cases, has time and again referred to the importance and significance of the finding that the circumstances and conditions surrounding interstate and intrastate transportation are substantially similar. Thus, in its brief filed in this Court in *North Carolina* v. *United States*, 325 U. S. 507, the Commission stated (pp. 24-27):

> "The evidence * * * was ample to support the Commission's finding of similarity of interstate and intrastate transportation conditions. * * * Decisions of this Court * * * make it clear that intrastate traffic is not contributing its fair share * * * where the intrastate rates are lower * * * [and] where the transportation conditions affecting the interstate and intrastate traffic are substantially similar."

In its petition for rehearing, filed with this Court in the same case, the Interstate Commerce Commission stated at page 23:

> "When a disparity between interstate and intrastate rates is the subject of investigation, the first question is whether the interstate rate is reasonable and the next is whether the *transportation conditions* warrant an intrastate rate lower than the reasonable interstate rate * * * In many, perhaps most, of such cases, the Commission has prescribed an intrastate rate equal *mile for mile* to the interstate rate, to the end that both interstate and intrastate traffic will pay equal rates for equal service."

Similar statements were made by the Commission on page 27 of its brief filed in this Court in *Illinois Commerce Comm. et al.* v. *United States,* 292 U. S. 474. In that case this Court emphasized the importance of such a finding by holding that the operating results of each class of traffic need not be shown when it is found that the transportation conditions surrounding the two classes of traffic are substantially similar.

In an attempt to support this important allegation of its Section 13 petition, the New Haven relied entirely on the testimony of its witness Harold Q. Quinlan (125).* His

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* Numbers in parentheses refer to pages of the minutes before the Interstate Commerce Commission which are a part of Exhibit 1 in the District Court.

testimony on this question was limited to a statement that many of the interstate trains make stops in New York State and that "New York intrastate commutation passengers travel on these interstate trains, ride in the same cars, and often occupy the same seat with interstate commutation passengers" and that both classes "travel over the same line of railroad between Port Chester and New York City and use the same terminal facilities in the latter city" (125). This is all the proof which the New Haven presented on this important issue.

Obviously, this is a mere conclusion unsupported by facts. It has no probative value and cannot support a finding of similarity of transportation conditions. Furthermore, it might be inferred from the statement of the witness that substantial numbers of both groups of commuters travel together. The record shows the contrary.

The evidence shows that an overwhelming majority of interstate commuters ride on modern, streamlined or deluxe trains, whereas the majority of New York commuters ride on old-style trains of the multiple unit type. Over 81% of the interstate commuters ride on air-conditioned, deluxe or streamlined trains, whereas only 2.4% of New York commuters ride on such trains. On the other hand, 91.2% of the New York commuters ride in multiple unit trains, none of which is air-conditioned and none of which carries streamlined or deluxe coaches. Approximately 71% of the interstate commuters travel in deluxe or streamlined trains, which make no New York stops, and during the rush hours when 90% of all commuters travel, only one inbound and two outbound deluxe or streamlined trains make any stops in New York State. Two of those trains make only two New York stops, and the third makes only one stop in New York State (252-314; Exhibit 37).

The only group of trains in which the two classes of commuters travel together in substantial numbers is the multiple unit trains originating or terminating at Stamford, Connecticut. But this group of trains is overwhelmingly patronized by New York commuters and the number of interstate commuters is relatively insignificant. In the five-day test period there were only about 5,600 interstate commuters in this group of trains as compared with 71,000 New York commuters, a ratio of more than 12 to 1. The 5,600 interstate commuters traveling in these trains constituted only 6.8% of the total interstate commuters traveling in and out of Grand Central Terminal in that week (Exhibit 37).

We do not assert that under no circumstances can the Interstate Commerce Commission ever validly find unjust discrimination against interstate commerce where the transportation conditions are not similar. In *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 187 (292 U. S. 1), and *Increases in Tennessee Freight Rates and Charges*, 272 I. C. C. 625, 646, *supra*, the transportation conditions were not similar. But, the differences in transportation conditions were such that those surrounding the *intrastate traffic were less favorable* to the carriers in respect to cost of service and other factors bearing upon that issue. Accordingly, in those cases the Interstate Commerce Commission was in a position to go a step further and found that the conditions surrounding intrastate traffic were *less favorable* to the carriers as a basis for finding unjust discrimination against interstate commerce caused by the lower intrastate freight rates.

Thus, in *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, the Interstate Commerce Commission stated:

> "In determining the Cummer scale [Florida intrastate rates] results in unjust discrimination against interstate commerce the fundamental question * * * is whether the traffic moving on that scale pays 'a fair proportionate share' of the cost of maintaining defendant, or whether it causes an undue revenue burden upon the interstate traffic of defendant. The record shows the low earnings of defendant; the low earnings on its log traffic as compared with its earnings on other low-grade commodities; *the much lower earnings on its Florida log traffic than on its interstate log traffic;* and the much lower level of the Cummer scale than of other scales applicable to interstate and intrastate throughout the South. These facts and the cost evidence clearly warrant the conclusion that the traffic moving under the Cummer scale does not pay its 'fair proportionate share' of operation and maintenance alone. * * * We find that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida are not on the whole as favorable as the circumstances and conditions surrounding the interstate movement of logs over defendant's lines." (186 I. C. C. at pp. 187, 189; italics supplied.)

In this case the transportation conditions are not similar, but, unlike the two cases just cited, the transportation conditions surrounding New York commuter traffic are *more* favorable to the New Haven since the interstate commuters are provided with superior *and more costly* service.

If, as the Interstate Commerce Commission held in *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, *supra*, the fundamental test, in determining whether intrastate rates cause unjust discrimination against interstate

commerce in violation of Section 13, is whether the intrastate traffic is paying its *"fair proportionate share"* or whether it causes an *undue* revenue burden upon the *interstate traffic* of a carrier, *how is that test to be made* in a case such as this where the conditions surrounding New York traffic are more favorable to the carrier?

The fairness of the proportionate share of the contribution of the New York commuter fares cannot, in this case, be tested by the interstate fares, since that test can be used only when the transportation conditions are substantially similar, or when the differences are such that they are *less favorable* to the carrier in respect to the intrastate traffic.

The impossibility upon this record of testing the fairness of the proportionate share which the New York commutation traffic should contribute may be easily illustrated.

First, let us assume for the sake of argument that the analysis of the operating results of New York commuter traffic as shown by the Interstate Commerce Commission in its memorandum brief in the District Court (p. 31) is correct, and that the service under the interim fares was producing a monthly profit of $186. The Interstate Commerce Commission has directed an increase in the New York fares amounting to $216,000 on an annual basis, or about $18,000 per month. In other words, the Interstate Commerce Commission has held, upon its own analysis, that a monthly profit of $18,186 from New York commutation traffic would be a "fair proportionate share" for such traffic to contribute to New Haven's revenues.

But, the crucial question in this case is, by *what test* or means and upon what evidence could the Interstate Commerce Commission determine that unless the New York fares are increased to produce that additional revenue they

will cause unjust discrimination against interstate commerce?

Clearly, the test could not be merely a fair return upon the New York service under the interim fares, since that would amount to direct regulation of intrastate rates, a power which Congress has not conferred upon the Interstate Commerce Commission.

True, the inadequacy of return might well be an element or factor for consideration in making the test. For example, let us assume that the $18,186 monthly profit determined by the Interstate Commerce Commission to represent the "fair contribution" of the New York commutation traffic would produce a return of only 2% upon the property used in the service and that the interstate commuter traffic was earning a profit which produced a return of 6%. Under those facts, the element of the lower return on the New York traffic could be considered with the other evidence, including the differences in transportation conditions and fares in making the required test to determine the "fair proportionate share" to be contributed by the intrastate traffic.

But, let us assume that the superior and more costly interstate commutation service is producing a monthly loss of $18,186*, whereas the lower fares charged for the New York service are producing a monthly profit of $186. Under such circumstances, it would be patently absurd to even suggest that the New York fares charged for service performed under substantially different and more favorable conditions to New Haven than the interstate service caused any discrimination against interstate commerce.

Conceivably, a fair test of the "fair proportionate share" could be made. But, a more searching and thorough

* The record shows that the interstate traffic is more costly but does not show whether it produces a profit or loss (314).

inquiry would be necessary. The present record does not furnish an adequate basis to make such required inquiry.

The decision of the Court in *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474, 483-4, clearly demonstrates the distinction between Section 13 cases in which it appears that the transportation conditions are similar and those in which the transportation conditions are not substantially similar. There the Court upheld a finding of unjust discrimination against interstate commerce and stated:

> "Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

Since a more searching inquiry would be necessary to enable the Interstate Commerce Commission to reach a determination as to whether any unjust discrimination was caused by the New York fares, the New Haven had the burden of presenting the necessary proof. In its absence, the finding of the Interstate Commerce Commission of unjust discrimination against interstate commerce is not supported by substantial evidence.

The deficiency in the proof of the New Haven cannot be excused or ignored by claiming that it would have been difficult or impracticable for the New Haven to present such proof. Other railroads have presented such proof (*cf. Jersey Central Commutation Fares*, 277 I. C. C. 693; *New Jersey-New York Commutation Fares*, I & S Docket 5585, decided March 6, 1950; *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157).

3. The decision of the District Court, as affirmed by this Court, by eliminating the need for proof and findings as to discrimination, in substance makes State-fixed railroad rates reviewable by the Interstate Commerce Commission *on the basis of reasonableness* rather than the single basis provided by Congress, that of discrimination.

4. If, without having the record before it, the Court accepted the view of the facts in this case advanced by the Interstate Commerce Commission and the District Court, the errors in this view should have been more fully presented to this Court than they were in the brief submitted in opposition to the motion to affirm.

The factual issue in dispute is whether the intrastate commuter service for which the State Commission fixed rates merely "broke even", as contended by the Federal Commission, or whether it earned a 15% return, as contended by the State Commission. This controversy is in turn principally dependent upon three items in the cost study which the Company submitted to the Federal Commission. These three items are: (1) the allowance of credit for ground rentals in computing Grand Central Terminal expense; (2) the amount allowed for tolls paid by the New Haven for use of New York Central tracks; and (3) the erroneous use of the group method of ascertaining costs instead of a train-by-train method. Largely because of difference of opinion as to these three items, the railroad claimed that it lost $37,000 a month on the intrastate commuter traffic, the State Commission claimed it made a profit of $48,000 a month; and the Federal Commission's Examiner found that the service "broke even". The State Commission's contentions in greater detail with respect to each of these three items are as follows:

Grand Central Terminal Expense.

In its cost study the New Haven charged to New York commutation service $50,456 as expense for one month for its joint use of Grand Central Terminal, owned by the New York Central. It was the contention of the New York Commission that this item of expense was overstated by $24,207.

The Grand Central Terminal railroad yard is underground on a double deck steel structure, leaving the land at street level and the space above, except the area covered by the station building itself, available for non-railroad use. The Grand Central Terminal covers an area from 59th Street to 42nd Street, extending from the east side of Madison Avenue to the west side of Lexington Avenue.

In the space above the railroad lands in this area, numerous structures have been built, supported by column footings placed on the railroad land. The owners of these buildings pay to the New York Central or its wholly owned subsidiary holding title to the lands substantial sums as ground rents for the space so occupied. These ground rents are distinct from building rents received from the use of the non-railroad structures in which the railroads have made investments. The ground rents are amounts received for the use of the space above the lands used as a railroad yard (321-4).

The New Haven uses Grand Central Terminal jointly with the New York Central under a contract with the latter company, the owner of the Terminal (Exhibit 33, which is a part of Exhibit 3 before the District Court). Under this agreement, the ground rent revenues received by the New York Central for the use of the space above the railroad lands are expressly recognized as credits which actually reduce the net cost for joint terminal use billed by the New York Central to the New Haven.

Accordingly, when the New York Central bills the New Haven for its share of the joint use, the bills specify the amount of Grand Central Terminal rental, taxes and other expenses, and against such expenses are credited (1) Terminal concession revenues*, and (2) ground rent revenues. Under the agreement the difference or net expense is specified on the bills to the New Haven, and that is the amount paid by it for its proportionate use of Grand Central Terminal (327).

The New Haven does not receive any actual revenue in the form of ground rents. Its sole benefit from them is its right under the contract to have them credited against gross expenses of the Terminal in the computation of the net amount payable for its proportionate use. The right of New Haven to have these revenues so credited exists only so long as it continues to use the Terminal for railroad purposes.

In its cost study the New Haven charged to New York intrastate commutation service for Grand Central Terminal expense $24,207 more per month than it actually paid for use of the Terminal by eliminating and disregarding these ground rent credits. It based such elimination upon the claim that they are derived from non-railroad usage of the space above the railroad lands and that they are accounted for on its books as non-operating revenue, with the acquiescence of the Interstate Commerce Commission.

It was and is our position that a charge to one railroad for joint use of the railroad facilities of another should be based upon a reasonable sharing of actual cost and fixed charges, and the Grand Central Terminal contract between the New York Central and the New Haven provides for

* The New Haven did not eliminate these non-railroad concession revenues as credits against the cost of commutation service.

such an arrangement, since it provides a reasonable sharing of the actual net expense of the Terminal (326-333).

It has never been our position, as implied in the report of the Interstate Commerce Commission, that these ground rent credits should be recognized simply because the contract so provides. Our position is that these ground rent credits should be recognized because they represent the proper use of railroad property to reduce transportation cost.

An important item in the cost of rendering passenger service into and out of a large city is a passenger station or terminal in such city. This is particularly true in New York City where terminal cost may be kept within reason only by maximum economy in the use of space and by the most careful efforts to obtain incidental revenues which will reduce transportation costs.

It is apparent that such consideration must have been in the minds of the designers of the Terminal, since the railroad yard facilities were placed at great expense below street level. A double deck steel structure and the enormous expense of such construction, including electrification, which made the underground terminal possible, found its economic justification in the fact that the ground areas at street level and in the space above were left free for profitable use by the erection of commercial structures.

Furthermore, it is our position that such a plan for a terminal in New York City was the obligation of railroad management in the interest of economic transportation, and therefore the true net cost applicable to transportation must recognize the credits available by renting the space above ground to reduce the gross burden of transportation costs.

The New Haven itself recognized this obligation to reduce cost, and in an early commutation fare case conceded that these ground rent revenues would reduce Terminal

expense. (See record on appeal, *People ex rel N. Y., N. H. & H. R. Co.* v. *P. S. C.*, 215 N. Y. 689.) In that case the then president of the New Haven testified:

> "The ground rent of all the terminal service, that is of the service that can be used over where our tracks are, will be credited to the expense of the terminal, and as that increases or that develops it will go toward the terminal expense, and the greater that is the less the terminal expense. As that increases, of course, we will share in the benefits of that increase with the New York Central. It will be all in the bill" (Record on Appeal, fols. 1922-3).

The New Haven argued in its brief that:

> "*All rentals in the terminal go to reduce terminal expenses.*"
>
> * * * * * *
>
> "Complainants' own proof is that the Terminal is credited with all rentals upon the land" (fols. 1921, 1923, 2046), (pp. 1-2).

The fundamental basis for our position in respect to ground rent credits is that New York commutation service should reflect the true net expense of the Terminal, and we contend that the terminal contract between the New York Central and the New Haven is wholly consistent with that principle because it recognizes ground rent revenues as credits reducing the net annual cost of the Terminal.

By every test of reasonableness and as a matter of sound principle, these ground rent revenues should be considered as proper credits to railroad operating costs, enabling passengers to be carried at lower cost than if no such offsets were available to modify the tremendous cost of a mid-town underground railroad terminal.

This contract meets the test of reasonableness (326-333) and is in harmony with the principle recognized by this Court in *Tank Car Corporation* v. *Terminal Co.*, 308 U. S. 422, 428.

Furthermore, the accounting practice followed by the New Haven in respect to these ground rent revenue credits has no bearing on the question of how the credits should be treated in any proceeding involving rates. The complete irrelevance of this accounting practice in a rate proceeding is demonstrated by the decision of this Court in *Norfolk and Western Ry. Co.* v. *U. S.*, 287 U. S. 134, 141-142.

Harlem Toll Expense.

In Exhibit 35 received in the Interstate Commerce Commission proceeding, the New Haven claimed $40,765 a month as an item of expense to New York commutation service for Harlem tolls. It was and is the position of the New York Commission that this item of expense was overstated by approximately $12,000.

The New Haven's right-of-way and track coming into New York City from the east terminate about 12 miles from Grand Central Terminal. From that point its trains operate over the tracks of the New York and Harlem Railroad to Grand Central Terminal. That operation is covered by a perpetual trackage right granted in 1848 by the New York and Harlem Railroad to New Haven.

This trackage agreement (Exhibit 33, a part of Exhibit 3 before the District Court) fixed the compensation rate to be paid at that time and provided for future arbitrations in case of disagreement. The contract left the two parties or their chosen arbitrators free to agree on any amount, or form, or basis of compensation.

There were two arbitrations under the agreement, the last one being in 1861, which provided for payment by the New Haven of specified amounts for each passenger carried in trains of the New Haven over the New York and Harlem tracks into Grand Central Terminal, such amounts to be adjusted in accordance with subsequent changes in New Haven's fares between New York and New Haven (336-9).

The amounts paid per passenger by the New Haven for the use of the Harlem tracks are arbitrary amounts having no relation to actual costs and expenses of the Harlem tracks; thus, it differs fundamentally from the arrangement for the joint use of Grand Central Terminal.

Amounts so arbitrarily fixed and determined should be disregarded in any proceeding involving rates and only the reasonable cost of rendering the service, including a reasonable return on net investment should be allowed (*Tank Car Corporation* v. *Terminal Co.*, *supra*, 308 U. S. 422, 428).

In accordance with that principle, the staff of the New York Commission (307; 336; 339) determined the actual investment on the New York and Harlem tracks and the actual expenses and taxes involved in maintaining the same, including a reasonable return on investment, and made an apportionment of such cost to the New Haven's New York intrastate commutation service. On that basis a reasonable cost per month for trackage service was determined to be $28,538, as compared to $40,765 charged by the New Haven for Harlem tolls to New York commutation service in its cost study.

The New Haven did not controvert this amount of $28,538 for what it purported to represent but rested its claim for Harlem trackage expense solely upon the tolls paid pursuant to the contract.

Group Method against Train-by-Train Method.

In its cost study the New Haven followed what it styled a "group method" of ascertaining the cost of New York commutation service, that is, it selected for cost study purposes as a group all trains making any stops in New York State. This method assigns the same cost per passenger mile to all passengers on all study trains. This method was challenged since it ignored the difference between the heavy traffic density on trains occupied preponderantly by New York commuters on the one hand and the relatively light density on other trains used largely by non-commuters and interstate commuters, on the other. This difference is of particular significance because of the heavy density of New York commuters in the rush hour trains operating in and out of New York City, when 90% of all commuters travel.

It was and is our position that a train-by-train method of determining the cost of New York intrastate commuter service is a proper and correct method, since it necessarily recognizes the varying density of traffic on individual trains.

Accordingly, the staff of the New York Commission, using the basic cost study data submitted by the New Haven, reassembled such data on a train-by-train basis, and the result was to reduce the cost of New York commuter service by $24,253 per month (354-356).

The group method followed by the New Haven apportions train costs between New York intrastate commuters on the one hand and all other passengers on the other hand, by first taking the total cost of those trains as a group and then apportioning such cost to New York intrastate commuters on a passenger mile basis. That method assumes a uniform average cost per passenger mile for all classes of passengers and is obviously erroneous, since it does not take into account the fact that the cost per pas-

senger mile of a train which is heavily loaded is less than the cost per passenger mile of a lightly loaded train. That error is avoided by the train-by-train method used by the staff of the New York Commission.

The New Haven recognized, in an earlier commutation fare proceeding before the New York Commission, this serious error in the group method and the reasonableness of the train-by-train method (Exhibit 40, a part of Exhibit 3 in the District Court).

These three items were of great importance since they totaled approximately $61,000 per month. If the New Haven's cost study is corrected for these three errors its alleged loss of $37,000 per month on New York commutation service becomes a profit, and the New Haven is making a reasonable return on New York service even if all other cost items were decided against our contentions.

It is our position that no conclusion could properly be reached by the Interstate Commerce Commission as to whether the New York service was being operated at a profit or a loss, unless these three issues were decided. Furthermore, no finding could be made as to whether the New York fares caused unjust discrimination against interstate commerce unless and until a determination was made as to whether the New York service was being operated at a profit or loss.

It is to be emphasized that the issues in respect to each of these three items did not involve any mathematical or accounting controversy. There were no factual issues respecting these three important items in the cost study concerning which the conclusion of the administrative body must be accepted. On the other hand, the issues involved only principles of regulatory law.

The first two of the major disputed items, the Grand Central Terminal expense and the Harlem tolls, did not involve any issue of fact. There was no factual dispute over the mathematics and accounting for either of these items. The dispute was limited to the legal rule to be applied to the undisputed facts. Taking the Grand Central Terminal expense item as an illustration, the controversy was limited to the question of whether ground rent credits should be eliminated or included in determining the New Haven's share of terminal expense, a portion of which was chargeable to the cost of its New York commutation service. The amount of the credits appears in the New Haven's records and was not the subject of any mathematical or accounting dispute. If, as we contend, the credits are to be included as a matter of law, then this item of expense was overstated by $24,207, since the correctness of that figure was not challenged in any respect.

The question of whether or not a charge to one railroad for the joint use of the railroad facilities of another should be based upon a reasonable sharing of actual cost and fixed charges is a question of law and does not involve any factual determination.

It is especially significant to note that the New Haven recognized the soundness of the legal principle that the reasonableness of the amounts paid for the use of Grand Central Terminal and the Harlem tracks must be established in a rate proceeding, independently of the provisions of the contracts or the amounts paid pursuant thereto, before any charge for such expenses may be considered and allowed (Case 1856, Report of New York Public Service Commission, Vol. 1, 1925, p. 214). In that commutation fare case the New Haven contended, in regard to Grand Central Terminal and Harlem toll expense, that:

> "The reasonable expense of conducting the particular service is not that expense which is fixed by the terms of any contract, but is that expense which is reasonable in fact" (p. 216).

In respect to the issue in regard to the use of the group method instead of the train-by-train method, it is our position that the mere circumstance that the New Haven presented cost evidence based upon the group method is insufficient to establish that it is a proper method. The mere fact that the New Haven uses the group method is not substantial evidence to support a finding that it is a proper method especially in the light of the proof that the group method was erroneous and was so recognized by the New Haven itself in a prior proceeding (Exhibit 40 in the Interstate Commerce Commission proceeding, received in the District Court as a part of Exhibit 3).

> *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 689, *cert. den.* 338 U. S. 860.

5. The Federal Commission, instead of resolving each of the conflicting claims between the railroad and the State Commission, reached by some unascertainable method the conclusion that was in substance an unsupported compromise between the two. The District Court used the substantial evidence rule to rationalize its affirmance of the Federal Commission's decision. In so doing, without reviewing the evidence in the record contrary to that submitted by the railroad, it misapplied the substantial evidence rule. By its affirmance of the District Court's decision, this Court acted in conflict with its recent decision in *Universal Camera Corp.* v. *National Labor Relations Board* (1950), 340 U. S. 474, 488.

6. In support of this motion for rehearing the Commission resubmits the brief originally submitted in opposition to the motion to affirm. The brief is submitted without change, except for the correction of two items. They are at page 3, line 5, where the word "are" should obviously have been "were", and at page 4, line 11, where the words "general passenger service of the" should be inserted at the end of the line. If, as it might be if taken out of context, the uncorrected sentence on page 4 was read by this Court as a concession that the entire operations of the railroad (including freight) resulted in a deficit, it would be misleading because such a deficit occurred in only one of the three years under consideration. The railroad earned a return on book investment less depreciation as follows: 1947—1.21%; 1948—2.72%; 1949 (10 months)—1.79%.

7. Under the *per curiam* decision, we have no means of knowing the basis upon which the majority of the Court granted the motion to affirm. We respectfully submit that there is no basis upon which it could be found that the decision of the Court below was so clearly correct that the appeal is without reasonable justification and taken merely for delay. *Cf. Eichel* v. *United States Fidelity, etc. Co.*, 245 U. S. 102; *Evans* v. *Brown*, 109 U. S. 180. The appeal was taken in good faith and in the earnest conviction that the judgment of the Court below should be reversed. Under all of the circumstances and particularly in view of the public interests involved we respectfully submit that the case presents substantial questions which should be reviewed by this Court after hearing upon the merits.

WHEREFORE, Petitioners-Appellants respectfully request and urge that this Court grant rehearing and reconsideration of the order of November 26, 1951 herein; that said

order be vacated and that the Court retain the case for hearing on the merits in regular course.

Dated: Albany, New York, December 10, 1951.

Respectfully submitted,

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Lawrence E. Walsh

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Counsel for Petitioners-Appellants.

No. 346. NEW YORK ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK dissents to the action of the Court disposing of the case without oral argument. Dissenting memorandum filed by MR. JUSTICE DOUGLAS. *Nathaniel L. Goldstein*, Attorney General of New York, *Lawrence E. Walsh* and *George H. Kenny* for appellants. *Solicitor General Perlman* and *J. Stanley Payne* for appellees. Reported below: 98 F. Supp. 855.

MR. JUSTICE DOUGLAS, dissenting.

The Interstate Commerce Commission has ordered intrastate commuters' fares of the New York, New Haven and Hartford Railroad Company increased in New York to the level of interstate commuters' fares. The Commission found that the transportation conditions surrounding intrastate trains were substantially similar to those surrounding interstate trains. Interstate fares were determined to be reasonable. But present intrastate fares were found not to be producing a reasonable return on investment. The Commission concluded that persons and localities in interstate commerce, and interstate commerce, were being unduly discriminated against. Pursuant to § 13 (4) of the Interstate Commerce Act (49 U. S. C. § 13 (4)), it ordered intrastate fares raised to the level of interstate fares to remove the discrimination. A three-judge district court affirmed the order of the Commission as to the finding of discrimination against interstate commerce, but did not pass on the finding of discrimination against persons and localities in interstate commerce. 98 F. Supp. 855.

We have long insisted that the Interstate Commerce Commission supply us with an adequate basis for its decision. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504–505, 510–511; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488–489. When, as here, Commission action constitutes an intrusion on state power, there is a duty on that body clearly to justify its action. *Florida* v. *United States*, 282 U. S. 194, 211–212; *Yonkers* v. *United States*, 320 U. S. 685, 690.

To justify its conclusion of discrimination against interstate commerce, the Commission must show that intrastate commutation service is not producing its fair share of the New Haven's revenues. *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585–586; *United States* v. *Louisiana*, 290 U. S. 70, 75. Intrastate traffic must, of course, bear a proportionate amount of the burden necessary to meet maintenance and operating costs and yield a fair return on investment. But here, as in *North Carolina* v. *United States*, 325 U. S. 507, 516, the "Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income." It merely found that the interstate rates were reasonable and fixed intrastate rates at the same level.

We have here no finding as to the necessary relation between interstate and intrastate commutation rates. Perhaps intrastate fares need not be as high as interstate fares to produce intrastate's fair share of total revenue. Perhaps they should be higher. The critical issue is at what rates the two types of commuter traffic will be capable of producing their proper shares of revenue. It is not necessary on this record to equate the two rates in order to prevent diversion of traffic to the lower intrastate fare. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 485. An adequate basis for a conclusion of rate discrimination in this case would require a finding as to the

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amount of revenue expected of the intrastate and interstate commuters and the revenue-producing capacities of the two groups.

Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal.

No. 418. WEBERMAN *v.* AUSTER: and